HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S151/2021
File Title:	Ruddick v. Commonwealth of Australia
Registry:	Sydney
Document filed:	Form 27F - (Cth) Outline of oral argument
Filing party:	Defendant
Date filed:	15 Feb 2022

Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S 151 OF 2021**

BETWEEN: **JOHN RUDDICK**

Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**

Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE DEFENDANT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Legislative context of the impugned provisions (CS [12]-[15])

2. Provisions allowing for the registration of political parties were introduced into the *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**) with effect from 1984. Those provisions specified eligibility requirements for registration and conferred benefits on registered parties, including the right to have a party name or abbreviation printed on ballot papers. Those provisions now appear in Part XI of the Electoral Act.

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3. The original scheme included provisions substantially similar to the present s 129(1)(a)-(d) and (e), which impose limits on registered parties' choice of names. Subsequent amendments to the Act in 2004 and 2016 evidence Parliament's ongoing efforts to refine the scheme to reduce the risk of voter confusion arising from similar party names.

- Electoral Act, ss 129(1)(da), 214A (**JBA 1, Tab 3**)
- JSCEM, *Report into the conduct of the 2004 federal election* (**SCB 2, SC-21 at 370 [4.5], 375-379 [4.30]-[4.31], [4.36], [4.40]**)
- Revised Explanatory Memorandum to the 2016 Amending Bill (**JBA 9, Tab 41**)

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4. Despite these provisions, voter confusion, and concerns about it, have persisted. In response, Parliament enacted the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth), which inserted the impugned provisions – ss 129(3)-(5), 129A(2)-(3), 134A(1)(a)(iii), (1A)-(1B) – into the Electoral Act.

- JSCEM, *Report on the conduct of the 2019 federal election* (**SCB 2, SC-29 at 551**)
- Explanatory Memorandum to the 2021 Amending Bill at 9 [19] (**JBA 9, Tab 42**)

Material facts – voter confusion (CS [4]-[10])

5. It is not open to the plaintiff to suggest (including by referring on numerous occasions to "alleged confusion" – see eg **PS [22] (fn 35), [28]; PR [9]**) that there is doubt as to the existence of voter confusion as a result of similar party names. This is so because he has admitted on the pleadings in this proceeding that, at the September 2013 elections for the Senate, some voters who intended to vote for the Liberal Party unintentionally voted for Liberal Democratic Party (**LDP**) candidates due to confusion about their party affiliation.

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Further, the facts in the special case confirm that voter confusion occurred at that election: Amended Defence [25(a)] and Reply (**SCB 1, Tabs 7-8 at 38, 41)**. See, also **SCB 1 at 57-60 [64]-[67], [72], [74]-[75]**.

6. While the plaintiff's admission is confined to the 2013 Senate election, the Court should infer that at other federal elections since 2010 some proportion of voters who intended to vote for the Liberal Party instead mistakenly voted for the LDP when the latter party appeared to the left of the Liberal Party on the ballot paper. This is supported by:

   (a) the plaintiff's admission in relation to the 2013 Senate election (there being no reason why voters should have been confused at that election but not others); and

   (b) facts in the special case that demonstrate that the LDP's results are closely tied to whether it appears to the left or the right of the Liberal Party on ballot papers: **SCB 1 at 54-56 [57], [59], 61 [78]**.

Question 2 – Requirement of direct choice by the people (CS [16]-[31])

7. The Commonwealth Parliament has wide power to create and sustain the federal electoral system under s 51(xxxvi) of the Constitution (read with ss 10 and 31). Notwithstanding the fact that this power is "subject to" the requirement in ss 7 and 24 of the Constitution that Parliament be composed of members "directly chosen by the people", this Court has cautioned against treating that "direct choice" requirement as a broad restraint on the legislature's power to determine the form of the electoral system.

   - *Mulholland v AEC* (2004) 220 CLR 181 at [6], [9] (Gleeson CJ); [63]-[65], [69], [86] (McHugh J); [155]-[156] (Gummow and Hayne JJ); [229]-[231] (Kirby J); [344] (Heydon J) (**JBA 5, Tab 22**)
   - *Murphy* (2016) 261 CLR 28 at [89], [178], [243], [263]-[264] (**JBA 6, Tab 23**)
   - *Day v Australian Electoral Officer for SA* (2016) 261 CLR 1 at [19] (**JBA 4, Tab 13**)

8. Laws specifying details concerning the requirements for registration of political parties – including the names that can appear on ballot papers – fall squarely within the matters that Parliament may regulate pursuant to that wide power. The plaintiff's arguments to the contrary involve three errors:

   (a) First, the incorrect assertions that the Constitution prevents discrimination between political parties, and also that the impugned provisions discriminate against the LDP: *Mulholland* (2004) 220 CLR 181 at [82], [86]-[87], [145]-[147],

[331]-[333], [350]-[351]; *McKenzie* (1984) 59 ALJR 190 at 191 **(JBA 5, Tab 20)**.

(b) Second, an incorrect assumption that the requirement that certain electoral laws be justified by a "substantial reason" extends to the impugned provisions, despite the fact that they do not legally or practically exclude any person from the franchise: *Murphy* (2016) 261 CLR 28 at [42] (French CJ and Bell J); [52], [54]-[55] (Kiefel J); [84]-[87], [96] (Gageler J); [222]-[224], [227] (Keane J); [244] (Nettle J); [306]-[307], [310], [321] (Gordon J) (**JBA 6, Tab 23**).

(c) Third, the proposition that the Electoral Act, as it stood prior to the enactment of the impugned provisions, forms part of a "constitutional baseline" against which amending legislation must be assessed (instead of assessing the law, as amended, against any applicable constitutional standard).

- *Rowe* (2010) 234 CLR 1 at [190]-[191] (Hayne J); [311] (Heydon J); cf [78] (French CJ) (**JBA 6, Tab 27**)
- *Unions NSW (No 2)* (2019) 264 CLR 595 at [113] (Nettle J) **(JBA 7, Tab 29)**

Question 1 – Implied freedom of political communication (CS [32]-[49])

9. Consistent with the judgment of the majority in *Mulholland*, which is not challenged and is not distinguishable, the impugned provisions do not burden the implied freedom.

- *Mulholland* (2004) 220 CLR 181 at [105]-[107] (McHugh J), [182]-[183], [186], [191]-[192] (Gummow and Hayne JJ), [336]-[337] (Callinan J), [354], [356] (Heydon J) (**JBA 5, Tab 22**)

10. Alternatively, the impugned provisions: (i) have a purpose that is not only consistent with the constitutionally prescribed system of representative government, but that promotes that system – namely, minimising the risk that voters will inadvertently vote for one party despite intending to vote for another; and (ii) are reasonably appropriate and adapted to that purpose (being suitable, necessary and adequate in the balance).

- Explanatory Memorandum to the 2021 Amending Bill at 3, 9 [19] (**JBA 9, Tab 42**)
- *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490 at [85] (Kiefel CJ, Keane and Gleeson JJ); [201] (Edelman J) (**JBA 4, Tab 17**)

Stephen Donaghue Brendan Lim Christine Ernst

15 February 2022